

## Section III Asset Management

### Chapter 8 Operators and Management Agents

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#### 8.1

#### Introduction

Production, Chapter 8, Operator and Management Agent Analysis, deals at length with the necessary qualifications for Operators and Management Agents of newly insured projects, and it also addresses required elements of the relevant contractual documents. The purpose of this Chapter is to describe the Office of Residential Care Facilities' (ORCF) ongoing expectations and monitoring of such Operators and Management Agents, and also to describe the procedures ORCF will follow in approving a *change in* an Operator or Management Agent of a currently insured or HUD-held project. The criteria and considerations set forth in Production, Chapter 8 apply with equal force when a Borrower on a currently FHA-insured or HUD-held project is seeking a change of Operator or Management Agent.

It is the responsibility of the Borrower to determine how to best organize the project and establish an effective means to oversee the operation of an insured project. In those instances where the Borrower decides to engage an Operator and/or Management Agent, the establishment of an effective relationship among the Borrower, the Operator and/or Management Agent, and ORCF, is critical to the success of the project over the life of the mortgage. ORCF's principles with respect to Borrower/Operator/Management Agent relationships are:

- A. While ORCF will work with Operators and/or Management Agents and monitor their performance, the Borrower shall remain responsible for a project's compliance with HUD regulations and requirements. Such responsibility shall apply regardless of whether ORCF also requires Operators and/or Management Agents to enter into regulatory or other agreements that place responsibilities on those parties also. ORCF expects that Borrowers will oversee the performance of their Operators and/or Management Agents and take steps to correct deficiencies as they occur, consistent with the controlling documents.
- B. ORCF will not intercede in the relationship between Borrowers and their Operators and/or Management Agents, except:
  - 1. to review the qualifications of proposed Operator and Management Agent candidates,
  - 2. to review the proposed contractual agreements between Borrowers and Operators and/or Management Agents, and

3. to assure compliance with applicable program requirements.

To this end, ORCF requires that detailed Management Agent and Operator documents be submitted (through the Lender) for prior ORCF approval whenever there is a proposed material amendment or termination of a project's Operator and/or Management Agent. For these purposes, an amendment is deemed material when it would substantially alter the scope of responsibility of an Operator or Management Agent, whether that change in scope is an increase or decrease in responsibility. In such circumstances, the Borrower shall submit the request and supporting information to the Lender for the Lender's analysis and recommendation to ORCF. In analyzing the request, the Lender shall adapt and tailor the approach and analysis used in recommending an Operator or Agent as part of a firm application (as set forth in Production, Chapter 8.8.).

It is the owner's responsibility to verify that the proposed Operator and/or Management Agent demonstrates the qualifications and experience necessary to assure that the project will be operated in a legal, prudent, efficient, and cost-effective manner prior to submitting a request for approval of such Operator and/or Management Agent. Appropriate qualifications and experience are addressed more fully in Production, Chapter 8, Sections 8.4 and 8.8. If the Borrower determines that the proposed Operator and/or Management Agent satisfies these criteria, the appropriate application shall be submitted to the Lender by the Borrower and, upon Lender review, ORCF's written approval must be obtained prior to entering into any binding agreements and/or providing services related to the applicable Section 232 project.

*\* Note if an application is to be submitted for a Change of Operator and/or Management Agent, the proposed entity should work with its attorney in the submission of the application.*

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## **8.2**

### **Ongoing Expectations for Operator Performance**

All HUD approved Operators (defined at length in Production, Chapter 8.2) shall conduct all project affairs in a complete and professional manner and comply with the following requirements:

- A. Be approved by ORCF prior to participation.
- B. Comply with all regulatory and program requirements, including without limitation:
  1. execution of a Healthcare Regulatory Agreement-Operator (Form HUD-92466A-ORCF);
  2. execution of a lease or other contractual agreement that is acceptable to ORCF; and
  3. execution of other documents in a format as required by HUD, and as may be determined by the nature of the transaction and the structure of the organization.

- C. Respond timely to any requests from HUD for project operating data.
- D. Provide evidence of insurance coverage in accordance with HUD requirements.
  - 1. Professional Liability Insurance coverage consistent with Production, Chapter 14, Insurance Requirements
  - 2. Property insurance as required and as agreed in the lease or other operating agreement
- E. Satisfy HUD requirements regarding financial accounting and reporting, including without limitation:
  - 1. properly maintaining books and accounts in accordance with Program Requirements, and as to allow for audit of the project;
  - 2. maintaining the HUD-required operating account;
  - 3. submitting to Lender (and also to ORCF directly if requested) quarterly and year-to-date certified financial reports, consistent with Program Requirements and as addressed in Asset Management, Chapter 4;
  - 4. providing answers to specific questions posed by ORCF, and
  - 5. adhering to all other financial guidelines of HUD.
- F. In accordance with Program Requirements, including without limitation the Operator Regulatory Agreement and Asset Management, Chapter 3 of this Handbook, electronically notify the Lender and ORCF of survey or other matters placing the project's licensure or funding at risk.
- G. Maintain the project in accordance with the lease (or other Borrower-Operator contractual agreement, as applicable) and program requirements.
- H. Comply with all applicable fair housing and civil rights laws and requirements.
- I. Maintain in full force and effect at all times, each of the permits and approvals of the healthcare project, including the state-issued operating license and any other authorizations, consents, approvals, permits, actions, filings and/or certifications necessary to operate the project. (Refer to Healthcare Regulatory Agreement-Operator)
- J. Engage the services of an independent consultant, if required by ORCF, at its expense, to alleviate project operating deficiencies that have been identified by ORCF. All such consultants must be approved by ORCF prior to such engagement.
- K. Implement and maintain a risk management program meeting ORCF requirements, in accordance with Program Obligations. (See Production, Chapter 2)

- L. Maintain regular communications with the assigned ORCF representative and provide prompt notification for all urgent financial, operational and/or regulatory compliance issues.

## 8.3

### Ongoing Expectations for Management Agent Performance

“Management Agent” is a term defined in Production, Chapter 8.3. A Management Certification – Residential Care Facility (Form HUD-9839-ORCF) shall be required for any entity that is directing the day-to-day functions of a healthcare project with respect to a management agreement, and is not required to execute the Operator Regulatory Agreement under the criteria of Production, Chapter 8.2. If, however, that entity *is* required to execute the Healthcare Regulatory Agreement-Operator), pursuant to any of the criteria in Production, Chapter 8.2, then the Management Agreement which that entity executes must incorporate subordination language approved by HUD. The requirements and responsibilities of Management Agents are described in detail in the Management Certification – Residential Care Facility. The typical duties of Management Agents, which shall be described in detail in the management agreement, may include, but are not limited to the following:

- Personnel Administration
- Resident Admissions
- Supervision of resident care/patient services
- Marketing
- Direction of project operations and maintenance services
- Administration of contracts and commercial leases
- Billing
- Collections
- Accounting services
- Enforcement of employment policies and internal financial controls
- Food services
- Banking services
- Maintenance of business licenses, permits, and other certifications from governmental authorities
- Coordination of State licensure functions
- Coordination of HUD Real Estate Assessment Center (REAC) inspections, if applicable
- Representation of the project at official meetings
- Performance of any other activities necessary for the function and management of the health care project as further described in the management agreement.

The Management Certification is applicable to the Borrower (or Operator, depending on the particular contractual structure) and Management Agent. The separate parties together certify that they will comply with HUD requirements and contract obligations, execute an acceptable Management Agent agreement, and further that no payments have been made to the owner in

return for awarding the management contract to the Management Agent and that such payments will not be made in the future. Management Agents must also comply with all applicable fair housing and civil rights laws and requirements.

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## **8.4**

### **Expectations for Consultant and Contractor Performance**

Borrowers, Operators and/or Management Agents may, without ORCF's consent, (but as limited by Program Obligations, the operating lease and the management agreement, as applicable), engage consultants or contractors to provide assistance and/or guidance in specialized areas. Certain engagements of consultant services, such as the hiring of legal counsel, are for services clearly beyond the traditional scope of managerial expertise. Other such engagements may be for consultants that offer a highly specialized skill in a narrow area of project operations, such as pharmacy, psychiatry, rehabilitation management and case coding, and are generally advisory in scope and for a negotiated fee over a limited period of time.

Consultants are distinguished from Management Agents as follows:

1. Consultants make recommendations and have no contractual or other authority to commit or exact resolutions of their own
2. Consultants advise on matters within specific areas of expertise for a specific time frame

If an entity, which was presented by the Borrower or Operator to be a consultant, is found by HUD to have project commitment authorities or to be providing a wide scope of managerial services over an extended time period, ORCF may deem the consultant to be a Management Agent and may require that the entity be reviewed and approved as a Management Agent.

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## **8.5**

### **Procedure for Change of Operator and/or Management Agent**

The Borrower shall be independently responsible for the initial screening and selection of an Operator and/or Management Agent for the project; however, as described in this Chapter, such selection shall be subject to Lender review and to final review and approval of ORCF.

All requests for the approval of an Operator and/or Management Agent shall be initiated by the Borrower. Such request shall be submitted to the Lender at least sixty (60) days prior to the date such Operator and/or Management Agent is proposed to commence its duties under the operating lease or management agreement, and shall include the required documentation described in detail in the TPA Checklist (available on the Section 232 Program website) for proposed Operators and/or Management Agents. Submissions should be sent electronically.

In certain limited circumstances, it may prove necessary for the Borrower (or Master Tenant or Operator, if applicable) to approve an emergency replacement Operator or Management Agent.

In such circumstances, the Borrower shall be required to immediately notify ORCF and the Lender of such exigent circumstances, and within five (5) business days of such emergency replacement, shall submit all the required documents required by this Chapter for the review and approval of the new Operator and/or Management Agent as set forth herein.

When a change of Operator or Management Agent is requested, evidence of an Operator's (or Management Agent's) experience, as delineated in Production, Chapter 8.4, shall be provided in a format that includes specific examples, including the applicable healthcare project's name, type of care, location, and unit and bed count. For projects that added units to a market, evidence shall also include the year the project opened, key operating metrics (fill pace, occupancy, net operating income margins, etc.), and the specific responsibilities required for the management and operation of such health care project. The requirements of this Section are intended to better ensure that HUD will approve Operators and Management Agents that are committed to the long-term success of the project and have the requisite experience to operate and manage the project.

Before the ORCF Account Executive (AE) evaluates a request for change of Operator or Management Agent, the Lender shall first review the request and make a recommendation. Factors for the Lender's analysis and recommendation are set forth in Production, Chapter 8.10. The Lender shall submit its analysis and recommendation to the AE.

ORCF and OGC have also developed a Submission Checklist for Transfer of Physical Assets (TPA) & Lessee/Operator/Management Agent Change that specifies the documents that are required to transact a change of either an Operator or a Management Agent. The checklist is available for review on the Section 232 Program website.

Operating Lease requirements and Management Agreement requirements are detailed in Production, Chapter 8, Sections 8.5 and 8.6, respectively, of the Production portion of this Handbook.

The AE shall review the request, and the Lender analysis and recommendation of that request, consistent with Production, Chapter 8.9. The decision will be transmitted to the Servicing Lender, Borrower and applicant concurrently.

The Management Agent may begin performing their duties and or responsibilities upon receipt of a written final approval from ORCF, in addition to the executed Management Agent Certification. There is no preliminary approval for a Management Agent.

It is ORCF's practice that if upon examination of the application and the attached instruments by the appropriate HUD staff and OGC, the submission is found to be in order, then a preliminary approval may be given to a proposed Operator. The Operator may be authorized to assume responsibilities once preliminary approval is granted. Preliminary approval may be based on conditions of documents in need of correction and or revision as well as a preliminary approval pending ORCF's receipt of all recorded documents. If the terms of the preliminary approval are not met within 45 working days from the date of the issuance of the preliminary approval,

(unless further time is granted by the Commissioner in writing), the preliminary approval shall be terminated.

Until ORCF gives a preliminary and or final approval of an Operator and or Management Agent in writing, the transaction may not take place. HUD will prosecute to the fullest extent possible, any unapproved unauthorized transactions.